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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1936.

No. 260.

IN THE MATTER

*of*

UNITED CIGAR STORES COMPANY OF AMERICA,

*Debtor.*

CITY BANK FARMERS TRUST COMPANY,
Assignee of Florence H. Bugbee,

*Petitioner,*

*against*

IRVING TRUST COMPANY, as Trustee of the Estate of the above-named Debtor, *et al.*,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

## BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

WILLIAM D. WHITNEY,
*Counsel for Respondent, Irving Trust Company, as Trustee.*

DONALD C. SWATLAND,
R. L. GILPATRIC,
*Of Counsel.*

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## BRIEF IN OPPOSITION ON BEHALF OF TRUSTEE

### OPINIONS BELOW

The opinion of the Special Master (Irwin Kurtz, Referee in Bankruptcy) appears at page 37 of the record and

is not reported. The opinion of the District Court (Judge Hulbert) is found in the record on page 49 and is unofficially reported in CCH Bankrupty Law Service, par. 3702. The opinion of the Circuit Court of Appeals (per Judge Chase) appears on page 71 of the record and is reported in 83 Fed. (2d) 209. All were in favor of respondents.

## OUTLINE OF CASE

This Court is asked to review the disallowance, in proceedings under Section 77B of the Bankruptcy Act, of a landlord's claim for loss of future rent after termination of the lease, the landlord having failed to contract for any surviving liability on the part of her tenant in such event. The Special Master found that, upon the disaffirmance of the lease in prior bankruptcy proceedings of the Debtor, the landlord by her own acts had ended the lease and with it all liability of the Debtor long prior to the enactment of Section 77B. On this finding, which was confirmed by the District Court, the Court below held that the landlord had no claim since

> "Sec. 77B did not create new rights to form the basis of claims but only enlarged the remedy to make some valid claims provable in proceedings under Sec. 77B which were not before provable in bankruptcy" (R. 73).

## THE FACTS

The lease in question was of premises in the City of Trenton, New Jersey, between the petitioner's assignor (in this brief referred to as the landlord) and the Debtor, for a term which, at the time of the Debtor's adjudication in

bankruptcy on August 29, 1932, had nearly 14 years still to run (R. 19, 20). The Trustee in Bankruptcy found the lease burdensome and, on November 11, 1932, disaffirmed the lease and surrendered the premises (R. 5).

Although the lease made no provision for the Debtor's remaining liable for loss of rent after re-entry upon default, the landlord re-entered immediately (R. 5), restored certain alterations which the Debtor had made (R. 41), and entered into new leases of the property to other tenants (R. 33-35).* So matters stood until Section 77B was enacted over 18 months later, and the Debtor had filed its petition for reorganization thereunder. Then the petitioner, as assignee of the landlord, filed a claim for $86,124.37 representing the whole rent payable under the lease from the Debtor's bankruptcy until expiration, less the alleged fair rental value during the same period (R. 3-10).

## QUESTIONS PRESENTED

The Court below was confronted with two questions:

*first*, whether Section 77B made provable the claim of this landlord who had terminated her lease after its rejection in the prior bankruptcy proceedings of the Debtor, albeit the rejection and termination took place before the enactment of the statute, and

---

*The lease provided that upon default of the tenant "it shall be lawful for the said lessor, without notice, to re-enter the said premises and remove all persons therefrom" (R. 26), and that "at the expiration *or other determination* of this lease" the alterations and improvements to the premises made by the tenant should "belong to and become the property of the lessor" (R. 28).

the lease contained no provision for the Debtor's liability surviving such termination,

and

*second*, whether the Special Master and the District Court correctly interpreted the New Jersey law in holding that in taking back her property and dealing with it as she did upon the refusal of the Trustee in Bankruptcy to adopt the lease, the landlord had terminated the lease and with it all further liability on the part of the Debtor.

The errors assigned are that in deciding each of these questions against the petitioner the Court below has misconstrued both the federal and the local law. The petitioner also contends that, in taking into consideration on the second branch of the case the effect under the lease and New Jersey law of the landlord's restoration of the premises, the Court below went outside the issues raised by the pleadings or the proof.

## STATUTE INVOLVED

The provisions of Section 77B(b) of the Bankruptcy Act dealing with landlords' claims are set forth in Appendix A to this brief.

## STATEMENT AS TO THE ISSUE OF FEDERAL LAW PRESENTED

In so far as this case involves the construction of a Federal statute, the precise issue raised is not of general importance, and in deciding it the Circuit Court of Appeals

was astute to interpret the statute so as to avoid doubts as to its constitutionality or conflicts with applicable decisions of this Court. As the petitioner concedes, no conflict has arisen among the several circuit courts of appeals as to the views expressed in the decision below; nor is there any basis that we know of for the petitioner's apprehension that such a conflict will arise in the future.

In fact, this case can only assume importance by treating it, as the petitioner has sought to do, as involving a wide range of questions that *might* arise in the construction of the provisions for landlords' claims in Section 77B.* Actually the one question raised in this case as to the meaning of Section 77B is an exceedingly narrow one, only affecting landlords' claims

> (a) which are based on leases which, *unlike* the ordinary form of lease, contain no special covenants for damage or indemnity, and
>
> (b) where, *prior to* the passage of Section 77B, the liability of the lessee had been terminated during bankruptcy proceedings in which the period for the filing of claims had expired.

In short, the landlords who would benefit from the petitioner's interpretation of the statute are the exception rather than the rule.

In attempting to persuade this Court that there are special and important reasons for a review on writ of certiorari in this case, the petitioner has referred to the status of landlords' claims generally in this reorganization

*See, for example, page 7 of the petition.

proceeding. But, of the 138 landlords' claims filed in this proceeding, totaling $6,185,000, to which the petitioner refers as now pending in various stages of litigation (R. 8), there are but 7 claims, aggregating in amount about $125,000, which would be affected by the granting of a writ in this case. Again, the petitioner charges that the decision below "practically nullifies the obvious attempt of Congress to make provision for landlords' claims" (p. 10); yet the fact is that 170 landlords' claims have been allowed to date in this very proceeding for amounts aggregating over $3,300,000.* Of the 180 other landlords' claims filed against the Debtor and disallowed, the greater part were asserted by landlords who had executed express releases of the Debtor prior to the enactment of Section 77B (see *In re United Cigar Stores Company (Otis)*, 83 Fed. (2d) 202).

In the same vein the petitioner also makes mention of a number of alleged chain store corporations now in reorganization under Section 77B in which the questions involved in the reorganization proceedings of this Debtor are, according to the petition, "certain to arise" (p. 8). Yet there is no specification as to which of such reorganization proceedings grew out of bankruptcy proceedings pending prior to the enactment of Section 77B, nor any showing as to how many claims are pending in such proceedings at the suit of

*It is significant that the petitioner refers in this connection to the decision of the Court below in *In re United Cigar Stores Company (Kuehner and Fischer, appellants)*, not yet reported; whereas the claim in that case, although not provable prior to Section 77B, was actually proved and allowed under Section 77B in the amount of $44,377.55. This was because the claimants' lease, as contrasted with petitioner's lease, did contain a covenant of indemnity against loss which survived the landlords' reentry and termination of the lease.

landlords with leases as deficient as that of the petitioner's with respect to damage or indemnity covenants.

## RESPONDENT'S POSITION AND SUMMARY OF ARGUMENT

### (a) As to the question of federal law:

The Circuit Court of Appeals has held that Section 77B makes no provision for the allowance of a landlord's claim based on a lease under which the debtor's liability ceased to exist prior to the enactment of the statute, notwithstanding that the lease had been rejected during the debtor's earlier bankruptcy proceedings. This conclusion follows, we believe, not only from the terms of the statute, but also from its purpose and legislative history. Moreover, a contrary interpretation of the statute would, as applied here, raise serious doubts as to its constitutionality.

### (b) As to the question of local law:

In affirming the Special Master's findings of fact and ruling on the New Jersey law with respect to surrender, the court below did not so far sanction a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. On the contrary, in refusing to remand the case on account of a possible technical defect in the pleadings, the Court below was only observing the provisions of Rule XLVII of the General Orders in Bankruptcy promulgated by this Court.

## ARGUMENT

### I.

### THE CIRCUIT COURT OF APPEALS HAS CORRECTLY INTERPRETED SECTION 77B AS NOT EXTENDING THE LIABILITY OF A DEBTOR LESSEE BEYOND WHAT IT WOULD OTHERWISE BE UNDER THE LEASE PROVISIONS AND THE APPLICABLE STATE LAW.

The question of Federal law considered by the Court below was whether, under Section 77B(b), the landlord in this case had "a claim for damages because of injury occasioned by the rejection of the lease by the trustee in the prior bankruptcy proceeding" (R. 72). The question arose in this fashion: After the rejection of the lease in 1932, the Debtor remained as lessee.* Thereupon, the landlord elected to re-enter, restore the premises** and relet to other tenants, these acts together constituting termination of the lease in accordance with its terms and under the applicable New Jersey law.

Thus, at the time Section 77B became law in 1934, there was no obligation owing by the Debtor to the landlord, and the landlord could, therefore, have no claim in these proceedings unless, in enacting Section 77B, Congress had provided a right in bankruptcy where none existed in common law or in equity. The Court below held that this was not the intent of Congress and, we believe, correctly so.

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*See *In re United Cigar Stores Company (Reisenweber's, Inc.)* 69 Fed. (2d) 513, 516-17, C. C. A. 2d., cert. den. 293 U. S. 566.

**In the prior bankruptcy proceedings the landlord was allowed and received dividends upon a claim for expenditures in restoring alterations which the Debtor was obligated to do at the expiration of the term.

**(a) The language of the statute discloses no intention to change substantive rights of parties to leases by expanding the liability of the tenant as defined by contract and local law.**

Section 77B(b)(10) defines creditors to include

> "all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under this Act."

The term "claims" is defined in the same section as including

> "debts, securities, other than stock, liens, or other interest of whatever character".

Nowhere in the statute is there any indication that claimants should include others than those to whom the debtor is under some sort of obligation, executory or otherwise, at the time of the filing of the petition for reorganization.

The statute then makes specific reference to landlords' claims as follows:

> "In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for

> damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this act, * * *."

The petitioner assumes that it comes within the class of landlords "injured by such rejection". It seems apparent, however, that the injury to which the statute refers is legal injury, for which an action would lie against a debtor outside of reorganization proceedings under the statute. Where a word is used in a law, it must have its legal meaning.*

In a brief filed by certain parties as *amici curiae,* an argument is based upon the English law. This overlooks a salient point of distinction between the English law and our bankruptcy jurisprudence as to the effect of the rejection of a lease in a bankruptcy proceeding. Under our law —certainly as it was in 1932 when the rejection in this case took place—the interest in the lease following rejection remains in the bankrupt.** The English Bankruptcy Act, on the other hand, expressly provides that "disclaimer" by the trustee (the equivalent of "rejection" under our nomenclature) shall operate to put an end to all rights and liabilities of the bankrupt as well as the trustee. See Bankruptcy Act of 1914, Section 54 (4 & 5 Geo. V, c. 59).

Moreover, it has long been established in the administration of insolvent estates under the American system that provability of a claim presupposes the existence of a legal right. Thus, the provability of landlords' claims

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*See for example *Ham* v. *State of Missouri,* 18 How. 126, 133; *United States* v. *Fidelity Trust Co.,* 222 U. S. 158, 160.

**Watson* v. *Merrill,* 136 Fed. 359, 363 (C. C. A. 8th); *In re Frazin, et al.,* 183 Fed. 28 (C. C. A. 2nd).

in insolvency proceedings (whether in bankruptcy or equity) require (1) a contract right and (2) recognition of its provability in the particular type of proceedings in question.* Section 77B removed the barrier to provability which formerly existed in the case of landlords' claims for future rent in bankruptcy proceedings (*Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320). But, as the Court below said in another connection, "there is no new definition of a claim; only of a creditor".**

There is nothing to indicate, therefore, that Congress, in providing for the recognition of landlords' claims,*** intended to do away with the requirement of a contract right or even to make over a landlord's contract by legislating into it a provision, which the landlord himself had failed to insist on, imposing liability on the tenant for future rent after termination. There is no reason why a claim

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*In equity receivership proceedings, provability was recognized when the lease contained a liquidated damage clause (*William Filene's Sons Co.* v. *Weed*, 245 U. S. 597) and, to a limited extent, when there was an ordinary indemnity covenant (*Pennsylvania Steel Co.* v. *New York City Ry. Co.*, 198 Fed. 721, 759, C. C. A. 2nd; *Rogers* v. *United Grape Products*, 2 Fed. Supp. 70, D. C. N. Y.); but not when the lease contained merely a re-entry clause without an indemnity covenant (*Gardiner* v. *William S. Butler & Co.*, 245 U. S. 603).

In ordinary bankruptcy proceedings (prior to the 1934 amendment of Section 63a) only claims based on leases with liquidated damage clauses prevailed (*Irving Trust Co.* v. *A. W. Perry, Inc.*, 293 U. S. 307), ordinary indemnity covenants not sufficing to make the claims provable (*Manhattan Properties, Inc.* v. *Irving Trust Co.*, 291 U. S. 320; *Miller* v. *Irving Trust Co.*, 296 U. S. 256).

***In re United Cigar Stores Company* (*Otis*), 83 Fed. (2d) 202, 206.

***The broad purpose of Section 77B was of course to make the reorganization plan binding on all existing creditors of the debtor corporation, so that the reorganized enterprise would be relieved of the threat of future suits by such creditors. Hence it was necessary that claims formerly non-provable, and hence non-dischargeable by bankruptcy, such as those of tort claimants, and landlords (with legal rights that would otherwise survive against the debtor), should be made provable.

based on a lease should stand on a better footing than any other contract claim. In the absence of a clear expression of legislative intent to the contrary, a landlord's claim "must be adjudged on the basis of the covenant that his interest was inserted in the lease" (*Miller* v. *Irving Trust Co.*, 296 U. S. 256, 258).

Both the petitioner and the *amici curiae* make a point of the language in the statute measuring the landlord's three-year claim from "the date of *surrender of the premises* to the landlord or the date of re-entry of the landlord"; the argument being that by the use of the italicized words Congress must have intended a landlord to have a claim notwithstanding prior surrender of the lease. The defect in this argument lies in a misapprehension of the phrase "surrender of the premises". These words have obviously a meaning different from that of *"surrender of the lease"*, the latter being a technical phrase to describe termination of the landlord and tenant relationship, while the term "surrender *of the premises*" simply indicates the physical turnover of the property necessarily consequent on the rejection of the lease by the trustee in bankruptcy. The technical "surrender" therefore, relates to the *leasehold estate,* while the term used in Section 77B relates only to delivery of the physical premises.

Both briefs in support of the petition also deduce from a change in the language of the bill while it was pending in the Senate that it was the intention of Congress to allow the claim of a landlord even though his lease had been terminated and a surrender accepted after rejection. There was, however, ample reason for the amendments introduced by the Senate, without inferring that they were made for the extraordinary purpose of creating claims where none existed before.*

*See Appendix B for a discussion of this phase of the legislative history of the bill.

**(b) By interpreting Section 77B as not creating new claims or taking away valid defenses to claims which existed prior to its enactment, the Circuit Court of Appeals has avoided a grave question as to the constitutionality of the statute.**

It is, of course, a familiar canon of construction that

> "A statute must be construed if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score." (*Linder* v. *United States*, 268 U. S. 5, at 17-18.)

In rejecting the petitioner's contention that the statute created new claims for landlords upon rejection of their leases without more, the Court below indicated that it would "have considerable doubt whether the bankruptcy power would support such an effort".* It is true that in *Manhattan Properties, Inc.* v. *Irving Trust Co.* (291 U. S. 320, 332) this Court said that under its bankruptcy power Congress may permit landlords' claims to be proven in bankruptcy proceedings or it may exclude them altogether. This seems to us, however, to mean no more than that Congress may give the character of provability to a valid claim, not that Congress can create claims. But even if Congress *can* (constitutionally) create claims, it would seem that its intention so to do must be expressed in clear and unambiguous language.

Although the courts have never attempted precisely to delimit the bankruptcy power, the decisions from the earliest days have defined it in terms of debtors and their cred-

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*This statement appears in the opinion of the same Court in *In re United Cigar Stores Company* (Kuehner and Fischer, appellants), decided July 14, 1936, and not yet reported.

itors, meaning, of course, existing creditors.* The word "bankruptcy" itself has always referred to the relation of debtors with their creditors (*Continental Illinois National Bank and Trust Co.* v. *Chicago R. I. & Pac. Ry. Co.*, 294 U. S. 648, 672), and thus bankruptcy legislation is primarily concerned with the adjustment of individual rights and liabilities which have their source in local law. Never, however, has the bankruptcy power been exercised to create a new class of obligations of a debtor which would not have existed otherwise.

Moreover, viewed conversely, if Congress has, in enacting Section 77B, created for this landlord a claim in bankruptcy, it has at the same time taken away from the Debtor a valid defense (discharge of liability through termination of the lease). With equal force it could be argued that Section 77B has taken away defenses to claims based on the statute of limitations, or the statute of frauds, or usury. Yet precisely the opposite has been held as regards the provability of claims in ordinary bankruptcy proceedings, although the language of Section 63(a) is open to the same construction. *In re Stern*, 144 Fed. 956 (C. C. A. 8th); *In re German-American Improvement Co.*, 3 Fed. (2d) 572 (C. C. A. 2d); *Remington on Bankruptcy, Fourth Edition*, §§ 1479, 1484.

The contrary would be a strange result for a statute entitled "for the *relief* of debtors". *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, at 588:

> "The discharge of the debtor has come to be an object of no less concern than the distribution of his property."

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*Such cases include *In re Klein*, 1 How. 277 (C. C. Mo.); *In re Reiman*, Fed. Cas. 11,673; *Hanover National Bank* v. *Moyses*, 186 U. S. 181; *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S. 555, at 582 *et seq.*; and *Continental Illinois National Bank & Trust Co.* v. *Chicago, R. I. & Pac. Ry. Co.*, 294 U. S. 648, 667-674.

It is familiar and fundamental law that a vested defense to a claim or action is fully protected from being cut off or destroyed by subsequent legislative action, whether the defense is based upon a contract or principles of common law. *Pritchard* v. *Norton,* 106 U. S. 124, 132; *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338; *P. Ballantine & Sons* v. *Macken,* 110 Atl. 910 (N. J.).

In *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, this Court held bankruptcy legislation unconstitutional because it took from a creditor, "without compensation", and gave to the debtor "rights in specific property which was of substantial value". What greater warrant is there for taking away from this Debtor a valid defense to a claim in order to benefit a former creditor, particularly where the donation to the latter is at the expense of the Debtor's *true creditors?*

## II.

**IT WAS NOT REVERSIBLE ERROR FOR THE SPECIAL MASTER TO INCLUDE IN HIS REPORT A FINDING THAT THE LANDLORD HAD RESTORED ALTERATIONS MADE TO THE LEASED PREMISES BY THE DEBTOR, WHERE THE FACT OF SUCH RESTORATION INDICATED THE TERMINATION OF THE LEASE IN ACCORDANCE WITH ITS PROVISIONS.**

(a) The District Court held, and was affirmed by the Court below, following the Special Master, that "the reentry of the landlord under the lease and her subsequent acts terminated all liability on the part of the tenant" (R. 50). The "subsequent acts" were (a) the restoration of the alterations made by the Debtor, which under the lease the

landlord was only free to do at its "expiration or other determination" (R. 28), and (b) the reletting to other tenants without notice to the Debtor. The petitioner's grievance is that of these three acts (*i.e.* the reentry, the restoration and the reletting) only the first and third were referred to in the stipulation of facts entered into by the parties, the facts with regard to the restoration being judicially noticed by the Special Master when he came to prepare his report to the District Court.

There had previously been filed with the Special Master a proof of claim on behalf of this same landlord for expenditures incurred in making the restorations in question. The proof of claim stated that "the lease is now expired by reason of the bankruptcy." Since this proof of claim was, by order of the District Court pursuant to Section 77B(c)(6), made part of the Court records in these proceedings, the Special Master very properly took notice of the allegations made by the landlord therein.

While not denying that the restoration actually took place nor challenging the Special Master's right to take judicial notice of the facts with regard thereto, the petitioner contends that it was improper for such facts to be taken into consideration by the Court below in reaching its decision. The only ground for the petitioner's complaint seems to be that in objecting to its claim on the ground that there had been a forfeiture of the lease, thereby terminating all future obligations of the Debtor thereunder, the Trustee only made specific reference to two of the three evidentiary facts that were the basis of the Special Master's decision, that is, to the reentry and the reletting but not to the restoration (R. 14).

The Court below was not impressed with this rather technical objection and declined to send the case back in

order for the Trustee to plead a fact as to which there was no dispute. We submit that this did not constitute reversible error or grounds for the granting of a writ by this Court, particularly in the light of Rule XLVII of the General Orders in Bankruptcy promulgated by this Court which directs that the reports of special masters in proceedings under Section 77B "shall be deemed presumptively correct" and provides for the modification or rejection of such reports only when the court is *"fully satisfied* that error has been committed".

It is further noteworthy that in excepting to the Special Master's report the petitioner did not assign as error the Special Master's finding that the alterations made by the Debtor had in fact been restored by the landlord, the exceptions going only to the effect given by the Special Master to such restoration (R. 44).

Neither of the cases cited by the petitioner in this connection is in point. In *General Utilities Co.* v. *Helvering,* 296 U. S. 200, the Commissioner of Internal Revenue had raised a question of fact before the Circuit Court of Appeals that had not been presented to or ruled on by the Board of Tax Appeals, although the Court was without power in such a case to make any findings of fact. But in the present case the landlord's conduct in making the restoration was specifically included in the findings of fact of the Special Master, on the basis of which the Court below rendered its decision.

In *Liberty National Bank* v. *Bear,* 265 U. S. 365, the case was remanded because the trustee in bankruptcy, in seeking to invalidate a lien under Section 67f of the Bankruptcy Act, had failed to allege or prove that the debtor was insolvent when the lien was obtained. There is noth-

ing, however, to indicate that this Court would have reached the same conclusion had the Debtor's insolvency been shown by the record (even though not pleaded by the trustee), as is the case here with respect to the restoration of the alterations.

(b) The petitioner also contends that the restoration made by the landlord was in the nature of repairs and that under New Jersey law the making of such repairs does not effect a surrender. Even were this a correct interpretation of the local law, the argument would be of no avail to the petitioner's claim. This petitioner has written her own law in her contract of lease, and it is there provided that it is only upon termination of the lease that she may restore the alterations made by the Debtor.

In any event, the petition admits (at p. 11) that the question of local law is not of sufficient importance in itself to warrant the granting of a writ.

## CONCLUSION

The respondent respectfully submits that on the facts of this case the decision below was manifestly correct and in accordance with established principles of law, that no question of great and general interest or importance is presented by this case, and accordingly that no sound reason exists for a review by this Court.

The petition for a writ of certiorari should therefore be dismissed, with costs.

WILLIAM D. WHITNEY,
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## APPENDIX A

### Statute Involved.

"The term 'creditors' shall include for all purposes of this section and of the reorganization plan, its acceptance and confirmation, all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such claims would otherwise constitute provable claims under this Act. The term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. * * * In case an executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee or receiver in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall, for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor. The claim of a landlord for injury resulting from the rejection of an unexpired lease of real estate or for damages or indemnity under a covenant contained in such lease shall be treated as a claim ranking on a parity with debts which would be provable under section 63 (a) of this act, but shall be limited to an amount not to exceed the rent, without acceleration, reserved by said lease for the three years next succeeding the date of surrender of the premises to the landlord or the date of reentry of the landlord, whichever first occurs, whether before or after the filing of the petition, plus unpaid rent accrued up to such date of surrender or reentry: * * *." Bankruptcy Act § 77B (b) (10), 11 U. S. C. A. Sec. 207 (b) (10).

## APPENDIX B

### Statement as to Certain Aspects of Legislative History of Section 77B

The bill (H. R. 5884), as it was originally passed by the House, provided in respect of landlords' claims as follows:

> "In case any executory contract shall be rejected, the same shall be deemed to have been breached [as of the date of the approval of the petition or answer filed], and the holder shall be entitled to file a claim for damages for such breach, and such claim may be allowed provided such contract shall not have been terminated by forfeiture, reentry or otherwise." (Matter in brackets ours.)

This provision was changed by an amendment on the floor of the Senate to a form substantially similar to that finally adopted, viz.:

> "In case any executory contract or unexpired lease of real estate shall be rejected pursuant to direction of the judge given in a proceeding instituted under this section, or shall have been rejected by a trustee in bankruptcy or receiver in equity in a proceeding pending prior to the institution of a proceeding under this section, any person injured by such rejection shall for all purposes of this section and of the reorganization plan, its acceptance and confirmation, be deemed to be a creditor to the extent of the injury resulting from such rejection * * *."

The original phrasing clearly had to be discarded, for it was insufficient from the landlord's point of view in two important respects:

*First*, the typical lease* contains a covenant for damages or indemnity after termination, and the reference in the original statutory phrasing to every "holder" of an executory contract might well have been construed to cover every holder of such a covenant, with the consequence that claims on the covenants themselves would have been lost by termination.**

*Second*, the original phrasing was wholly inapplicable to pending bankruptcy or equity receivership proceedings.

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*Represented, for example, by 331 out of the 354 leases on which proofs of claims were filed in the present proceedings.

**Such a rule would in fact have eliminated cost of the landlords' claims which have been allowed in this very proceeding.